

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:16-cr-120-T-17TGW

GARY TODD SMITH
a/k/a "Todd Smith"

**NOTICE OF MAXIMUM PENALTIES, ELEMENTS OF OFFENSE,
PERSONALIZATION OF ELEMENTS AND FACTUAL BASIS**

The United States of America hereby files this Notice of Maximum Penalties, Elements of Offense, Personalization of Elements and Factual Basis, stating as follows:

ESSENTIAL ELEMENTS

The indictment (Doc. 18) alleges two crimes. Count One alleges a conspiracy to commit mail fraud affecting a financial institution and wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349. Count Two alleges a substantive count of wire fraud affecting a financial institution in violation of 18 U.S.C. § 1343.

The essential elements of Count One, a violation of 18 U.S.C. § 1349, conspiracy to commit mail fraud affecting a financial institution and wire fraud affecting a financial institution, are as follows:

First: two or more persons, in some way or manner, agreed to try to accomplish a common and unlawful plan to commit mail fraud affecting a financial institution and wire fraud affecting a financial institution, as charged in the indictment; and

Second: the Defendant knew the unlawful purpose of the plan and willfully joined in it.

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a maximum sentence of thirty years may be imposed because the following facts have been admitted by the defendant and are established by this plea of guilty: the wire fraud scheme and the mail fraud scheme each affected a financial institution.

The essential elements of Count Two, a violation of 18 U.S.C. § 1343, wire fraud affecting a financial institution, are as follows:

First: the Defendant knowingly devised or participated in a scheme to defraud, or to obtain money or property by using false pretenses, representations, or promises;

Second: the false pretenses, representations, or promises were about a material fact;

Third: the Defendant acted with the intent to defraud; and

Fourth: the Defendant transmitted or caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud.

Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a maximum sentence of thirty years may be imposed because the following facts have been admitted

by the defendant and are established by this plea of guilty: the wire fraud scheme affected a financial institution.

PENALTY

Counts One and Two each carry a maximum sentence of thirty years of imprisonment, a fine of \$250,000, a term of supervised release of not more than five years, and a special assessment of \$100 per felony count for individuals. With respect to certain offenses, the Court shall order the defendant to make restitution to any victim of the offenses, and with respect to other offenses, the Court may order the defendant to make restitution to any victim of the offenses.

FACTUAL BASIS

Smith Advertising and Associates, Inc. (“Smith Advertising”), was a North Carolina corporation, whose office was located at 321 Arch Street, Fayetteville, North Carolina 28301. On July 20, 2004, Smith Advertising registered its Florida presence with the Florida Department of State’s Division of Corporations. Sometime in or about 2007, Smith Advertising’s Florida office was established at 1626 Ringling Boulevard, Suite 510, Sarasota, Florida 34236. Gary Todd Smith (also known as Todd Smith) conspired with Gary Truman Smith, Amber Mathias, Marcia Caulder, Tanisha Melvin, D.J., S.A.

and others known and unknown to commit wire fraud and mail fraud, as described below.

Since at least as early as sometime in 2005, Smith Advertising had been experiencing financial difficulties. Ostensibly, to raise the necessary capital to operate the business, Smith Advertising entered into a factoring arrangement with a company, CapitalPlus Equity, LLC (“CapitalPlus”), which maintained its business office in Knoxville, Tennessee. Gary Todd Smith discovered that Smith Advertising could submit to CapitalPlus fake invoices (which were from Smith Advertising ostensibly to a client of Smith Advertising), which CapitalPlus would unknowingly rely upon to lend money to Smith Advertising under their factoring agreement. Smith Advertising began to submit false invoices to CapitalPlus. The conspirators also opened a series of Post Office boxes to serve as addresses for the clients to whom the false invoices were addressed. This fooled CapitalPlus for a while. However, sometime in or before March or April 2009, CapitalPlus notified Smith Advertising that it was going to begin sending statements directly to Smith Advertising’s clients rather than relying upon Smith Advertising to notify the clients, which would necessarily reveal the fraud.

This led Gary Todd Smith to begin to look for a substitute for CapitalPlus. Gary Todd Smith and Gary Truman Smith reached out to others, including to L.S., who lived in Sarasota, Florida, and had a prior existing relationship with Gary Todd Smith and Smith Advertising. On April 2, 2009, Gary Todd Smith emailed L.S. proposed terms for a potential seven million dollar extension of credit to Smith Advertising. On May 5, 2009, Gary Todd Smith and Gary Truman Smith met with a group of principals organized by L.S., which was then known as the “Investment Group,” to discuss replacing CapitalPlus as Smith’s factor. These principals later formed Receivable Management Funding (“RMF”) and they included M.S., W.S., and L.S. RMF was based in Sarasota and ultimately co-located with Smith Advertising’s Florida presence.

As a result of mailing statements directly to clients, in March or April 2009, CapitalPlus uncovered the fraud. On May 13, 2009, CapitalPlus’ Chief Operating Officer, S.A., notified Smith Advertising that it was in default under the terms of the factoring agreement and declared all of Smith Advertising’s obligations (\$4,542,302.66) immediately due and payable. However, S.A. agreed not to report Todd Smith and others to law enforcement if CapitalPlus was made whole. As part of the agreement, CapitalPlus required a written confession from Gary Todd Smith and Gary Truman Smith. They agreed and

provided the following statement: “[w]e decided the only way we could do so and to whether (sic) the storm was by robbing Peter to pay Paul in hopes the economy would correct itself ... we could only do so by making up false invoices.... Our intent was to fabricate only for short period of time until payments would pick back up and we pay you off (sic).” As part of the agreement not to report either Gary Todd Smith to law enforcement, CapitalPlus also required that both Gary Todd Smith’s and Gary Truman Smith’s salaries be capped at \$25,000 per month.

In an email dated October 27, 2009, M.S., a manager of RMF, wrote to Gary Todd Smith, explaining to him that, before RMF would transfer any funds, the principals wanted to speak with CapitalPlus. The email made it clear that CapitalPlus’ reason for terminating their business with Smith Advertising was material to RMF in moving forward with a factoring agreement with Smith Advertising. M.S. wrote that he wanted to “hear from the ‘horse’s mouth’ that they are looking to reduce their line because of pressure from their funding sources.” Gary Todd Smith did not want CapitalPlus to reveal to RMF the fraud that had been uncovered. Ultimately, on October 29, 2009, Gary Todd Smith emailed M.S. S.A.’s phone number. S.A. falsely told M.S. that Capital Plus was ending its relationship with Smith Advertising purely for business reasons (a capital concentration issue). S.A.

elaborated that CapitalPlus was terminating its relationship with Smith Advertising because of a concentration issue and he indicated that Smith Advertising's business had become too large for CapitalPlus. S.A. intentionally omitted the truth, that is, CapitalPlus severed its relationship with RMF because it had uncovered the fraud. On December 23, 2009, S.A. sent an email to Gary Todd Smith's attorney in which he wrote "I want to get this deal done and over with but my partners aren't willing to accept the \$2.5 million. So we either work something out or your guys go to jail." On December 24, 2009, RMF wired the final buyout payment to CapitalPlus. CapitalPlus then filed a UCC Financing Statement Amendment that cancelled the original financing statement between CapitalPlus and Smith Advertising. RMF had replaced CapitalPlus as Smith Advertising's factor, a relationship that continued until Smith Advertising imploded in March 2012.

Individuals joined RMF to raise the capital that was then lent to Smith Advertising. The conspirators created and had created false invoices from Smith Advertising to support the factoring arrangement with RMF. Because RMF allowed the clients to pay on the invoices directly to Smith Advertising, RMF did not detect the fraud. Instead, money was lent by RMF to Smith Advertising and money sent back to RMF directly from Smith Advertising, a pattern that continued until the scheme collapsed.

Individuals also lent money directly to Smith Advertising in the form of bridge loans. Bridge loans were supposed to fund Smith Advertisings' advance purchase of advertising space. Because the purchase of advertising space was done in bulk and in advance, Smith Advertising was supposed to be able to purchase it at a discount. Smith Advertising could then sell the advertising space to its clients at a lesser discount and thereby benefit its clients while still profiting from pre-purchasing the advertising space. However, to purchase in advance advertising space, Smith Advertising needed to have capital available to make the purchases. Bridge loans were meant to provide the upfront capital needed to buy the advertising space, bridging the gap in time between when the advance purchase of the advertising space was completed and the time when Smith Advertisings' client paid Smith Advertising for the space. As with the invoice factoring, the bridge loans were supported by fake invoices from Smith Advertising, usually created and supplied to the lenders or sometimes implied, depending on the amount of documentation sought by the individual lender for each loan. The fake invoices falsely and fraudulently showed that Smith Advertising owed money for having made an advance purchase of advertising space at a discount. The invoices were (1) all fake, (2) not true regarding what was purchased and for

the amount it was purchased, and (3) unlawfully used the identities of people and entities to “bill” Smith Advertising without their permission.

In addition, all of the loans – invoice factoring and bridge loans – were premised on a fundamental lie, that is, the true purpose of the loans materially varied from that which was represented to the lenders. In truth and fact as the conspirators then and there well knew, the true purpose of the loans was actually to cover Smith Advertising’s losses, to attempt to stay current on the ever-growing debt, and to benefit the conspirators (e.g., keeping themselves employed and paid).

With respect to the creation of the fraudulent documents, Smith Advertising had an instruction manual, entitled “Instructional Manual – Drksd.doc,” which described how to create the fake invoices and promissory notes. The side of the business handling the fraud was known as the “Dark Side” of the business. The “Dark Side” manual provided the location on the computer system where fake invoices were to be stored, and instructed the fabricators to ensure that a copy of each invoice “created [was] also filed under the corresponding lender folder under Vendor Invoices.” The Manual listed vendors to choose from when fabricating invoices and provided information about the vendors, e.g., “Billboards,” “Printing & Direct Mail,” “Social Media,” and “video production.” Finally, the manual reminded the fabricator

to change the invoice number by “4-15” if the invoice was to be for the same date as a prior invoice. The file’s properties showed that the author of this file was employee Tanisha Melvin.

One example of the creation process was documented in emails between Marcia Caulder and Gary Todd Smith on March 2, 2012. Marcia Caulder sent Gary Todd Smith an email containing a fake invoice from Harperprints of Henderson, North Carolina, which listed six printing jobs, each of 500,500 items and each for \$1,000,000. Gary Todd Smith replied to that email on the same day, indicating in his reply that the numbers were “too even” and that they should be “mixed up so they are not all \$1mm.” A few minutes later, Marcia Caulder replied that she changed it.

The false invoices were, after creation, often sent directly to the lenders. First, conspirators manufactured the documents. For example, on February 7, 2012, Amber Mathias sent an email and attachment to Gary Todd Smith. The attachment contained promissory notes totaling \$1,350,000 to be loaned by victim-lender J.C. in return for \$233,000 in fees, as well as vendor invoices. In the email, Amber Mathias wrote, “all are printing except for one which was 100k for 10k so I made it a billboard job. Let me know if he will also be requiring client invoices with these.” Then conspirators sent the documents to the victims. For example, on October 15, 2009, Gary Todd Smith wrote to

victim-lender W.S., “Hi, [W.], attached is an opportunity to replace the deal due tomorrow.” Attached to the email was a promissory note stating W.S. would loan Smith Advertising \$50,000 on October 16, 2009, for a one-time fee of \$3,800. The loan would be paid in full by November 19, 2009. The second attachment to the email was a fraudulent invoice from Take One Productions to Smith Advertising for a \$107,600 video production job with a \$7,600 “pre-pay discount.” The third attachment to the email was a fraudulent invoice for a video production job from Smith Advertising to the Moore County North Carolina Convention and Visitors Bureau (“CVB”) in the amount of \$117,600. The terms of the loans were generally set in the solicitations by conspirators to lenders. For example, on January 27, 2011, Gary Todd Smith, using the email address ToddSmith@smithadv.com, wrote to victim-lender C.S., “we have 48K for 5 days if you want it. The discount is 600 dollars for you. Please let me know if you would like to do. We can email you the paperwork and send you the repayment check and fee. Thanks. Todd.” Another example included Tanisha Melvin, emailing on February 8, 2012, victim-lender C.S., the following false “opportunity” to lend money to Smith Advertising: “The following opportunity is available for your review: Loan Amount: \$40,000.00, Duration: 30 days, Fee: \$4,800.”

In addition, many of the loans were “renewed,” that is, the principal of the loan was lent again to Smith Advertising for a subsequent loan after the preceding loan had concluded. An email exchange between victim-lender J.M. and Tanisha Melvin and Amber Mathias on March 5, 2012, provided insight into the mindset of the conspirators during this process. Victim-lender J.M. asked Tanisha Melvin if a set of bridge loans he was involved in were going to be renewing again. Tanisha Melvin responded that they were going to be. J.M. was surprised by this, commenting, “How are you finding renewals for those?? They are monster deals!!” Tanisha Melvin forwarded the comments from the victim-lender J.M. to Amber Mathias and added, “Please read below for a good laugh!” Amber Mathias responded, “HAHAHAHAHAHAHA... Yeah they’re monster deals alright.”

In addition to wire communications crossing state lines (e.g., emails from Fayetteville, NC, to Sarasota, FL), mailings were sent in execution of the mail fraud aspect of the scheme. Recovered at Smith Advertising during the execution of the search warrant were FedEx and UPS shipment receipts that showed mailings from the Smith Advertising office in Fayetteville, NC, to victim-lender C.S.’s residence in Sarasota, FL. Several of the receipts contained bridge loan numbers such as CS91010A, and CS91010B. Others did not contain specific references to bridge loan file numbers, but they did

contain dates that coincided with dates found on the promissory notes. These receipts included FedEx shipment receipt with tracking number 796958991645, which documented a mailing through FedEx envelope using standard overnight service on April 6, 2011. The mailing was from Smith Advertising's office in Fayetteville, NC, to victim-lender C.S.'s residence in Sarasota, FL.

Some checks were even sent by private courier. On January 25, 2012, checks were actually flown to M.K. on a private flight (tail number N744SR), from Fayetteville Regional airport to the Sarasota airport (airport code SRQ) by Smith Advertising.

In addition to manufacturing false invoices and promissory notes, conspirators also fabricated other documents to perpetrate and mask the fraud. For example, on February 6, 2012, Marcia Caulder sent an email to M.S., a principal of the RMF group. Marcia Caulder wrote that Gary Todd Smith had asked her to send the message to him. The email appeared to show messages sent between Gary Todd Smith and D.G., Senior VP of Bridgeview Bank Group and a victim of identity theft, on January 26, 2012. In the initial message from Gary Todd Smith to D.G., Smith asked why several checks were returned when Smith Advertising had the funds available in their account. D.G.'s fabricated reply stated in part, "It appears it was a clerical

error... It was our fault. If you want to send them thru a second time they will be honored.” This email conversation was also sent by Gary Todd Smith to victim-lender C.S. on February 8, 2012.

The email communication between Gary Todd Smith and D.G. actually took place on September 14, 2011, and was about a different topic. Emails found on the server showed that Gary Todd Smith had sent the original, genuine conversation to Marcia Caulder on February 6, 2012; the text was edited by Marcia Caulder and returned to Gary Todd Smith. The contents of D.G.’s communication to Gary Todd Smith were falsely, fraudulently, and substantially altered.

Other examples of manufactured documents included a purchase order and a contract that were ostensibly from Cumberland County. On February 10, 2012, Marcia Caulder sent an email and attachment to Gary Todd Smith. The attachment was a Cumberland County (North Carolina) purchase order purporting to show an \$8,000,000 job with Smith Advertising for printing and direct mail services related to a flu vaccine campaign. The buyer for the county was listed as K.T.

The purchase order appears to be one for the City of Fayetteville, but with Cumberland County’s information replacing the city’s information. The signature on the bottom of the fraudulent purchase order is from G.W., who

worked in the purchasing department for the City of Fayetteville and who was a victim of identity theft.

Also on February 10, 2012, the purchase order email was followed by a message from Marcia Caulder to Gary Todd Smith with a contract attached documenting the (fake) \$8,000,000 production job between Smith Advertising and Cumberland County. The contract bears the same stolen signature of G.W. This contract was then emailed to victim-lender L.S., who was in Sarasota, FL, by Gary Todd Smith, who was in Fayetteville, NC, on February 10, 2012.

These emails and various wire transfers of money constitute thousands of wires that crossed state lines during and in execution of the scheme.

A large number of people and entities were defrauded by the scheme. At least 129 individuals lent funds to Smith Advertising as bridge lenders or as members of RMF. Seventy-four of them have claimed that, collectively, their losses exceed \$55,000,000. Many of the victims lost their life savings, retirements, or substantial portions of each. Many deferred retirement, came out of retirement, took on new jobs, moved in with other family members, and otherwise suffered substantial financial harm as a result of their losses. Smith Advertising maintained two sets of financial books, a false set and an accurate set. According to the accurate set of books, on February 23, 2012, Smith

Advertising's total assets were then valued at -\$66,723,391.55 and the total equity was -\$103,140,084.68, for a total value of -\$169,863,476.23.

In March of 2012, the scheme collapsed under the weight of its ever-increasing debt burden. The cash crunch was particularly acute in a series of transactions between M.K. and Smith Advertising. M.K., a bridge lender, required his principal and interest be returned to him before he would lend the money again to Smith Advertising. The problem was that Smith Advertising could not repay M.K. as he requested. Smith Advertising's Bridgeview Bank account was significantly in the red. Starting in December 2010, the average balance in the Smith Advertising Bridgeview account (ending with the numbers 8201) fell below zero. Monthly deposits and withdrawals for 2011 averaged \$7.4 million and \$7.6 million respectively. The monthly ending balances in 2011 on the account averaged -\$316,000. As might be expected, Smith Advertising incurred significant overdraft fees for the negative balances, \$79,551 in overdraft fees to Bridgeview Bank in 2011 alone. Finally, on or about January 25, 2012, Bridgeview Bank began returning Smith Advertising's checks as "dishonored" and marked "refer to maker."

M.K. banked with Regions Financial Corporation, more commonly known as Regions Bank. Regions Bank was a publicly traded Delaware corporation, headquartered in Birmingham, Alabama. Regions Bank operated over 1,600 branches in sixteen states. The accounts of Regions Bank were insured by the Federal Deposit Insurance Corporation (“FDIC”). Regions Bank’s FDIC Certificate number was 12368.

As Bridgeview Bank began “dishonoring” the Smith Advertising checks, Regions Bank began to question the Smith Advertising-related transactions. Gary Todd Smith attempted to intervene to keep the money flowing. Regions Bank’s Sarasota branch manager Linda Council received a phone call from Gary Todd Smith, who was in Fayetteville, NC. He told her that, while the checks had not cleared the Smith Advertising account, there really was enough money in the account to cover the checks to M.K. Gary Todd Smith offered to send a screen shot of Smith Advertising’s account balances. On January 24, 2012, at 10:51 a.m., Gary Todd Smith in Fayetteville, North Carolina, emailed Linda Council, in Sarasota, Florida, a screen shot of a webpage that read, “Welcome Todd Smith. Your last Bridgeview Business Internet Banking sign on was Tuesday, January 24, 2012 at 08:10 AM ET.” The screen shot showed the balance for the account ending in 8201 to be \$12,489,358.59. What Regions Bank did not know is that the

account balance was actually -\$12,489,358.59 and that the minus sign (showing it was negative \$12 million) had been fraudulently removed. The email was an electronic transmission of data that crossed state lines, beginning in Fayetteville, NC, and terminating in Sarasota, Florida, which is in the Tampa Division of the Middle District of Florida. By January 26, 2012, Bridgeview Bank had “dishonored” over \$14,800,000 of Smith Advertising’s checks that victim M.K. had deposited into his Regions Bank account. In the interim, M.K. had wired large sums of money back to Smith Advertising’s account at Bridgeview Bank. As a result of this email and other actions, FDIC-insured Regions Bank suffered a loss of approximately \$9,000,000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Robert Tager, Esq.

/s/ Thomas N. Palermo

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